NO. 76-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Petitioner*

v.

F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, *Respondents,*

and

UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)—*Intervenors*

PETITIONER'S REPLY TO THE FEDERAL RESPONDENTS' BRIEF IN OPPOSITION

RICHARD R. BRANN
RICHARD A. BROOKS
LAWRENCE J. MCNAMARA
3000 One Shell Plaza
Houston, Texas 77002

Attorneys for Petitioner

Of Counsel:

BAKER & BOTTS
Houston, Texas 77002

September, 1977

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

NO. 76-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Petitioner*

v.

F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, *Respondents,*

and

UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)—*Intervenors*

PETITIONER'S REPLY TO THE FEDERAL RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

Petitioner Southern Pacific filed its Petition for a Writ of Certiorari, No. 76-1400, on April 11, 1977. Federal Respondents finally filed their Brief in Opposition

in August, 1977. Petitioner would refer the Court to the original Petition which contains the matters required by Rule 23 of the Supreme Court Rules.

BRIEF FOR THE PETITIONER IN REPLY TO FEDERAL RESPONDENTS' OPPOSITION ARGUMENT

1. Federal Respondents, in attempting to undermine the evident conflict between the Circuit Courts of Appeal in definition of the crucial term "working conditions" as it appears in § 4(b)(1) of the Act (Res. pp. 9-10), fail to recognize the practical result of the decisions in the Fourth, Fifth and D. C. Circuits. As Petitioner pointed out (Pet. No. 76-1400 p. 8-9), under the Fifth Circuit definition, each specific "hazard" must be identified by the Federal Railroad Administration ("FRA") before that hazard can be exempted from OSHA coverage. Meanwhile, under the Fourth Circuit's definition of "working conditions", anytime the FRA "exercises" its authority by promulgation of a regulation which addresses the "environmental area", all individual hazards within the geographic environmental area become exempt from regulation under OSHA. The § 4(b)(1) exemption is triggered. The conflict which results from these differing interpretations is clear on a practical, real-world basis. When federal regulatory agencies are thus set upon a collision-course, it is appropriate for this Court to end the confusion. *Train v. Colorado Public Interest Research Group*, 421 U.S. 60 (1976).

2. The opposition brief of the Federal Respondents ignores the fact that Petitioner Southern Pacific still faces the enforcement of the standards involved. Should enforcement be granted, Labor may impose penalties,

establish an abatement period, and reinspect the premises of Southern Pacific in order to determine compliance. A decision on the validity of the original citation, therefore, depends upon the *present* scope of the exemption. Should this Court find the § 4(b)(1) exemption to have been triggered by any of the rule-making procedures already entered into by FRA,[1] Labor jurisdiction over Southern Pacific would end.[2]

3. Federal Respondents' Brief in Opposition (Res. p. 8, n. 7, and p. 11, n. 9) clearly shows that the Federal Respondents rely solely upon the inconsequential grammatical change of "whom" to "which" in the final version of the Act to refute otherwise unambiguous legislative history. This change of wording has *no* direct legislative history to aid in its interpretation.

---

1. FRA regulation of the railroad industry has been steadily progressing. The FRA has required the railroads to file copies of their operating rules and examine railroad employees compliance with them (39 Fed. Reg. 41175); it has comprehensively revised railroad accident and record keeping regulations (49 CFR Part 225), and it has issued safety regulations regarding signal use around rolling stock (41 Fed. Reg. 10904). In March, 1975, FRA issued an Advance Notice of Proposed Rulemaking, 40 Fed. Reg. 10693 (Mar. 7, 1975), in which the agency proposed to prescribe detailed occupational safety and health standards under the authority of the Federal Railroad Safety Act. A Notice of Proposed Rulemaking has now been announced as to a number of these standards. 41 Fed. Reg. 29153 (July 15, 1976). These proposals now prescribe civil penalties of at least $250.00 but not more than $2,500.00 for each day a violation continues as a separate offense. 41 Fed. Reg. 30649 (July 26, 1976).

2. Petitioner would again direct the Court's attention to the statement by the co-sponsor of OSHA, Representative Steiger:

> "It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, *even though the action might be at the formative stage of regulations or enforcement.*" 116 Cong. Rec. 38373 (Nov. 23, 1970) (Emphasis added).

On the other hand, the legislative history which concerns the triggering of the § 4(b)(1) exemption as to *industries* upon the exercise of some regulatory authority by another Federal agency is direct and unambiguous. (See Pet. No. 76-1400 pp. 12-15). Representative Steiger's statement regarding the definition of "exercise" is also unambiguous.[3] Clear legislative history should not be ignored in favor of speculation. The premise that Congress had knowingly worked a "major change" in the wording of the Act by substituting the grammatically correct "which" in the place of the grammatically questionable "whom" is factually attenuated and logically remote.

CONCLUSION

For the reasons set forth in Petitioner Southern Pacific's original petition for a writ of certiorari, the writ of certiorari should be granted.

Respectfully submitted,

Original Signed By RICHARD R. BRANN

By: _____

RICHARD R. BRANN
RICHARD A. BROOKS
LAWRENCE J. MCNAMARA
3000 One Shell Plaza
Houston, Texas 77002

Attorneys for Petitioner

Of Counsel:

BAKER & BOTTS
Houston, Texas 77002

3. See note 2, supra.